

190341

STATE OF SOUTH CAROLINA

(Caption of Case)

Happy Rabbit, LP on behalf of Windridge
Townhomes,

Complainant,

v.

Alpine Utilities Inc.,
Defendant.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET
NUMBER: 2008 - 360 - S

(Please type or print)

Submitted by: Benjamin P. Mustian, Esquire

SC Bar Number: 68269

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Columbia, SC 29202

Other:

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition

☐ Request for item to be placed on Commission's Agenda
expeditiously

☒ Other:

INDUSTRY (Check one)

- ☐ Electric
☐ Electric/Gas
☐ Electric/Telecommunications
☐ Electric/Water
☐ Electric/Water/Telecom.
☐ Electric/Water/Sewer
☐ Gas
☐ Railroad
☒ Sewer
☐ Telecommunications
☐ Transportation
☐ Water
☐ Water/Sewer
☐ Administrative Matter
☐ Other: _____

NATURE OF ACTION (Check all that apply)

- | | | |
|--|--|--|
| <input type="checkbox"/> Affidavit | <input type="checkbox"/> Letter | <input type="checkbox"/> Request |
| <input type="checkbox"/> Agreement | <input type="checkbox"/> Memorandum | <input type="checkbox"/> Request for Certification |
| <input type="checkbox"/> Answer | <input type="checkbox"/> Motion | <input type="checkbox"/> Request for Investigation |
| <input type="checkbox"/> Appellate Review | <input type="checkbox"/> Objection | <input type="checkbox"/> Resale Agreement |
| <input type="checkbox"/> Application | <input type="checkbox"/> Petition | <input type="checkbox"/> Resale Amendment |
| <input type="checkbox"/> Brief | <input type="checkbox"/> Petition for Reconsideration | <input type="checkbox"/> Reservation Letter |
| <input type="checkbox"/> Certificate | <input type="checkbox"/> Petition for Rulemaking | <input checked="" type="checkbox"/> Response |
| <input type="checkbox"/> Comments | <input type="checkbox"/> Petition for Rule to Show Cause | <input type="checkbox"/> Response to Discovery |
| <input type="checkbox"/> Complaint | <input type="checkbox"/> Petition to Intervene | <input type="checkbox"/> Return to Petition |
| <input type="checkbox"/> Consent Order | <input type="checkbox"/> Petition to Intervene Out of Time | <input type="checkbox"/> Stipulation |
| <input type="checkbox"/> Discovery | <input type="checkbox"/> Prefiled Testimony | <input type="checkbox"/> Subpoena |
| <input type="checkbox"/> Exhibit | <input type="checkbox"/> Promotion | <input type="checkbox"/> Tariff |
| <input type="checkbox"/> Expedited Consideration | <input type="checkbox"/> Proposed Order | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Interconnection Agreement | <input type="checkbox"/> Protest | |
| <input type="checkbox"/> Interconnection Amendment | <input type="checkbox"/> Publisher's Affidavit | |
| <input type="checkbox"/> Late-Filed Exhibit | <input type="checkbox"/> Report | |

Print Form

Reset Form

WILLOUGHBY & HOEFER, P.A.

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*ALSO ADMITTED IN TX

December 2, 2008

VIA HAND-DELIVERY

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RECEIVED
2008 DEC -2 PM 1:17
SO. DIST. SERVICE
COLUMBIA, SC

RE: Happy Rabbit, LP on behalf of Windridge Townhomes v. Alpine Utilities, Inc.;
Docket No. 2008-360-S

Dear Mr. Terreni:

Enclosed for filing on behalf of Alpine Utilities, Inc. are the original and one (1) copy of the Reply to Return to Motion of Happy Rabbit and Request for Oral Argument in the above-referenced matter. By copy of this letter, I am serving a copy of these documents upon the parties of record to this proceeding and enclose a Certificate of Service to that effect.

I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies that are enclosed and returning the same to me via our courier.

If you have any questions, or if you need any additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Benjamin P. Mustian

BPM/cf
Enclosures

cc: Nanette S. Edwards, Esquire
Richard L. Whitt, Esquire

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S

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PUBLIC SERVICE
COMMISSION

IN RE:)
)
Happy Rabbit, LP on behalf of Windridge,)
Townhomes,)
)
Complainant)
)
v.)
)
Alpine Utilities, Inc.,)
)
Defendant.)
_____)

**REPLY TO RETURN TO MOTION OF
HAPPY RABBIT AND REQUEST FOR
ORAL ARGUMENT**

Pursuant to Commission Regulation R. 103-829, and other applicable statutes, rules and regulations, Alpine Utilities, Inc. (“Alpine”) herein replies to the Return to Motion (“Return”) of Happy Rabbit, LP (“Happy Rabbit” or “Complainant”).¹ Additionally, for the reasons set forth herein and in Alpine’s Answer and Motion to Dismiss, Alpine respectfully requests the Commission to hold oral argument on Alpine’s Motion to Dismiss. In support thereof, Alpine would respectfully show as follows:

¹ Contrary to Happy Rabbit’s assertion in its letter to the Commission dated November 24, 2008, Alpine states that it has not been served with the Return as of the time of this filing. Counsel for Alpine acknowledges that on November 24, 2008, Happy Rabbit provided a copy of its filing to the other parties of record via electronic mail; however, Alpine asserts that the submission of pleadings to parties via electronic mail does not constitute service as contemplated by the Commission’s regulations. *See* Rule 5 of the South Carolina Rules of Civil Procedure. Accordingly, the Commission should determine the pending motion without reference to the Return as it is not properly before the Commission. However, Alpine submits this Reply in the event the Commission is disposed to consider Happy Rabbit’s Return.

I. UNVERIFIED PLEADINGS

In its Motion to Dismiss, Alpine noted that the Complaint filed by Happy Rabbit has not been verified. 26 S.C. Code Ann. Regs. R. 103-822 requires a complaint to include a “verification under oath ... if facts are alleged to be true within the knowledge of the person filing the pleading.” Alpine asserts that Happy Rabbit not only failed to provide the necessary verification of the information provided in its Complaint, but also has failed to remedy this deficiency since filing the Complaint. Therefore, the Complaint does not meet a fundamental requirement of the Commission’s regulations regarding practice and procedures. Moreover, Alpine asserts that the Return similarly fails to contain a verification of the information provided in the Return which Happy Rabbit alleges to be true. Happy Rabbit’s continued refusal to comply with the Commission’s regulations, regarding verification of factual pleadings warrants the dismissal of this action with prejudice.

II. FAILURE TO STATE A CLAIM

Happy Rabbit attempts to circumvent Alpine’s contention that the Complaint fails to satisfy Commission Regulation 103-819 and 103-824 and S.C. Code Ann. § 58-5-270 by simply making an ipse dixit statement that the Complaint contains a concise and cogent statement of the facts and that it is therefore sufficient. Happy Rabbit fails to place Alpine on notice of the nature of the dispute or the facts giving rise to the dispute. Furthermore, the Return appears to assert that Happy Rabbit’s request for a hearing and an inquiry by the Commission in and of itself constitutes the relief sought in this matter. Alpine contends that these positions taken by the Complainant are a distortion of the requirements set forth in the Commission’s regulations, that such statements do not constitute a statement of the facts or of the relief sought in this matter, and that the Complaint does not comport

with the requirements of administrative due process. Consequently, the Commission should not abide by Happy Rabbit's unavailing attempt to cure its pleading defects through erroneous interpretations of the Commission's rules governing practice and procedure in matters before it.

III. JURISDICTION AND CIRCUIT COURT PROCEEDING

Happy Rabbit again fails to establish a proper basis for a claim cognizable under the Commission's jurisdiction and inadequately attempts to assert that the issues raised in the instant proceeding before this Commission are separate and distinct from those issues it is attempting to raise before the circuit court. In its Return, Happy Rabbit merely states as fact that "this tribunal has jurisdiction over the business relationship between a utility [Alpine] and its customers [Windridge], pursuant to § 58-5-210." However, Happy Rabbit neglects to reference the nature of the dispute arising from the "business relationship" or how such a dispute, if one exists, is subject to the Commission's jurisdiction. Rather, Happy Rabbit apparently contends that any "business relationship" between a utility and a customer is necessarily subject to the Commission's jurisdiction and that simply asserting such without more is sufficient to meet any jurisdictional challenge. Alpine asserts, however, that Happy Rabbit's generalized statements regarding jurisdiction are insufficient to avail this Commission of the ability to address the vague issues presented by the Complaint. "The burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir., 1982). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). Because Happy Rabbit has failed to demonstrate that the issues purportedly raised in its Complaint

are subject to the Commission's jurisdiction, it should be summarily dismissed.

Likewise, Happy Rabbit does not elucidate its position that the issues raised in this proceeding would differ from those currently before the circuit court in a collateral proceeding or enlighten the Commission or Alpine as to the basis for its position that this claim arises under the terms of Title 58 of the South Carolina Code of Laws. Rather, Happy Rabbit is asking the Commission to assume jurisdiction over this Complaint based upon an unsubstantiated statement of jurisdiction. To the contrary, Happy Rabbit's Return specifically references certain "facts" as a "partial basis" for its Complaint which are a **verbatim** recitation of portions of its complaint pending in circuit court. Included in these unverified "facts" is a singular reliance upon S.C. Code Ann. § 27-33-50. As noted by Alpine in its Motion to Dismiss, any action arising under § 27-33-50 would not properly be before this Commission because the Commission's enabling legislation does not grant it the authority to enforce disputes arising under Title 27 of the South Carolina Code. Happy Rabbit clearly believes that the circuit court is the proper venue in which to adjudicate this matter inasmuch as it has asserted in its Circuit Court Complaint that the "actions complained about [therein] are in violation of South Carolina Statutes (*sic*) under the jurisdiction of [the circuit court]." Alpine therefore asserts that Happy Rabbit has failed to properly establish that the Commission has jurisdiction over this matter, in either its Complaint or its Return, and this fundamental flaw warrants dismissal of this matter.

WHEREFORE, for the foregoing reasons and for the reasons set forth in its Answer and Motion to Dismiss, Defendant respectfully requests that the Commission hold oral argument on

Alpine's Motion to Dismiss, issue an order dismissing the Complaint in this matter and grant such other and further relief to Alpine as is just and proper.



John M.S. Hoefer

Benjamin P. Mustian

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

Attorneys for Defendant

Columbia, South Carolina

This 2nd day of December, 2008

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S

Happy Rabbit, LP on behalf of Windridge,)
Townhomes,)
Complainant)
v.)
Alpine Utilities, Inc.,)
Defendant.)
_____)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of Respondent's **Reply to Return to Motion of Happy Rabbit and Request for Oral Argument** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211

Richard L. Whitt, Esquire
Austin & Rogers, P.A.
Post Office Box 11716
Columbia, South Carolina 29201

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SOUTH CAROLINA
PUBLIC SERVICE
COMMISSION

Clark Fancher
Clark Fancher

Columbia, South Carolina
This 2nd day of December, 2008.